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In the Supreme Court of the United States

OCTOBER TERM, 1990

ARCADIA, OHIO, ET AL., PETITIONERS

v.

OHIO POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION[1]

In enacting the Public Utility Act of 1935, Congress put in place a regulatory scheme in which both the Federal Energy Regulatory Commission and the Securities and Exchange Commission were entrusted with responsibility to regulate utility subsidiaries of public utility holding companies. Both FERC and the SEC have long understood Section 318 of the Federal Power Act (FPA), 16 U.S.C. 825q, to require an actual conflict between FERC and SEC re-

[1] This reply brief is submitted on behalf of the Federal Energy Regulatory Commission (FERC), a respondent supporting petitioners in this case. See Sup. Ct. R. 12.4. The Securities and Exchange Commission (SEC) joined FERC in the opening brief as an amicus curiae. Because the SEC is not a party to this case, this Court's Rules do not authorize it to submit a reply brief. See Sup. Ct. R. 37.3. The SEC is, however, in agreement with the views expressed in this brief.

quirements before giving precedence to the latter, thus permitting each agency to pursue its differing regulatory objectives. This understanding reflects the experience of the agencies in administering the FPA and the Public Utility Holding Company Act (PUHCA) and, as an interpretation of a statute by agencies charged with administering it, is entitled to *Chevron* deference.

1. As an initial matter, Ohio Power contends that no deference is due to the construction of Section 318 by FERC and the SEC, since that construction is claimed not to have been relied upon by FERC in the order at issue in this case. See Ohio Power Br. 13. Ohio Power is mistaken. In its order in this case, FERC began its discussion of Section 318 with a description of the administrative law judge's conclusion that FERC action would not subject "the same subject matter * * * to the requirements of both PUHCA and the Federal Power Act." Pet. App. 36a. FERC proceeded to advance *two* reasons for agreeing with this conclusion.

The first ground adduced by FERC is precisely the "actual conflict" interpretation that was plainly raised in the second question presented in the petition for certiorari.[2] FERC noted that "it is not clear that the SEC requires Ohio Power to purchase coal from its subsidiary at cost, rather than at market price." Pet. App. 36a. The SEC orders in this case, according to FERC, "do not appear to mandate the cost-based price where a market price would be lower, rather they permit a price up to a cost-based price." *Ibid.* FERC went on to add that, in its view, SEC Rule 92, 17 C.F.R. 250.92, permits the sale of goods produced by a

[2] Nothing in Ohio Power's brief in opposition to the petition for certiorari suggested that the second question presented in the petition—"[w]hether Section 318 * * * oust[s] the [FERC] of jurisdiction over rate matters only when there is an actual conflict" between PUHCA-based and FPA-based regulation—is not squarely before the Court in this case. See Sup. Ct. R. 15.1.

holding company subsidiary to any associated company at a market price "if the market price is lower than cost." Pet. App. 36a-37a.

Thus, the FERC order under review plainly advanced the argument that the SEC orders and rules relevant to this case permit a market-based price, so long as that price is lower than cost. Although FERC may not have articulated all of the implications of this argument as Ohio Power would prefer, the underlying premise is clear; in FERC's view, its action permitting a market price in this case was permissible because it did not conflict with SEC regulation of the Ohio Power-SOCCO transaction under PUHCA.[3] The court of appeals expressly recognized that "FERC's statutory interpretation rested on two rationales: (1) that there is no conflict between the approaches of the SEC and FERC and (2) that the same subject matter is not involved." Pet. App. 8a.[4] See also Pet. App. 14a ("FERC's first-stated * * * rationale was that no jurisdictional conflict arises because the SEC *may* require market pricing and 'it is not clear' that the SEC's orders in the present case impose a cost floor as well as a cost ceiling." (citation omitted)).

FERC did advance another ground for its decision: that ratemaking was a distinct "subject matter" from the SEC's

[3] For this reason, the cases cited by Ohio Power (Br. 15) are inapposite. In those cases, see *Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 473 (1988); *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 628 (1971); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962), the Court held that an administrative order could not be upheld on the basis of a rationale that was adopted for the first time as a litigation position and was not in the agency's order at all. In contrast, here the FERC order discussed and adopted the no actual conflict rationale as an alternative ground for its decision.

[4] We do not here address whether the SEC and FERC orders are in actual conflict. At pp. 10-12, *infra*, we suggest remand for the court of appeals to address that issue in light of the "actual conflict" standard in the first instance.

regulation under PUHCA Section 13(b), 15 U.S.C. 79m(b), of intra-corporate transfer prices for coal, and that FERC therefore could—consistent with Section 318—require Ohio Power to use a market price for the coal for ratemaking purposes even if that price exceeded the cost of the coal. See Pet. App. 37a-40a, 60a-64a.[5] The fact that FERC relied on an alternative ground to support the order under review does not affect the deference due to FERC's interpretation of Section 318 as requiring an actual conflict. This is particularly true since, as we discussed in our opening brief, FERC's understanding that Section 318 requires an actual conflict has its roots in an interpretation of Section 318 relied upon by FERC, its predecessor the Federal Power Commission, and the SEC that dates back to shortly after the statute was enacted and that FERC has continued to rely on in more recent cases. See FERC & SEC Br. 15-21.

2. Ohio Power contends, as did the court of appeals majority, that Section 318's bar to FERC jurisdiction is triggered whenever the SEC, without more, has regulated a given subject matter. Ohio Power Br. 18.[6] As we discussed in our opening brief (at 21-27), this view is in tension

[5] The court of appeals considered—and rejected—this rationale in a discussion separate from its discussion of FERC's no actual conflict rationale. See Pet. App. 10a-13a.

[6] Ohio Power pays lip service to the term "requirement" in Section 318, by acknowledging that it must be shown that the SEC has imposed a "requirement" with respect to a given subject matter before FERC is ousted of jurisdiction with respect to that subject matter. Ohio Power Br. 18. However, as Ohio Power's immediately succeeding discussion makes clear, it believes that *any* SEC regulation counts as a "requirement," and thereby ousts FERC from jurisdiction over the entire "subject matter." *Id.* at 18-19. In fact, a regulation that, for example, merely permits a regulated entity to engage in a particular activity would not impose a "requirement" and such a regulation would not oust FERC of jurisdiction to impose its own regulation.

with the language of the statute and with the few judicial decisions interpreting Section 318, all of which have determined the application of Section 318 by inquiring whether the challenged FERC (or FPC) action was in conflict with SEC regulation under PUHCA.[7] Moreover, Ohio Power's own discussion and that of its amici illustrate an additional, and important, difficulty.

Ohio Power and its amici contend that interpreting Section 318 to oust FERC of jurisdiction whenever the SEC has taken any regulatory action with respect to a given "subject matter" would invalidate FERC's adoption of a market-based price in this case, while not opening up any gaps in the comprehensive system of utility regulation pursuant to PUHCA and the FPA. For example, Ohio Power contends (Br. 40-41) that the long history of concurrent, consistent FERC/FPC and SEC regulation of purchases and sales of utility assets (discussed in our opening brief at (31-35)) is permissible under Section 318. It is argued that, although the SEC undeniably had authority to, and in fact did, regulate some aspects of the transactions (generally the purchase side, see PUHCA §§ 9 and 10, 15 U.S.C. 79i, 79j), that regulation did not impose requirements with respect to those aspects of the transaction regulated by FERC (generally the sale side, see FPA § 203, 16 U.S.C. 824b).

This argument can be understood in either of two ways. It may be that Ohio Power is here urging that concurrent

[7] Amici Registered Holding Company Group cites an SEC submission to the Conference Committee that produced the final version of the Public Utility Act as support for the view that Section 318 was intended to prohibit even consistent, concurrent regulation by FERC and the SEC. Holding Company Group Amici Br. 15-16. The report of the Conference Committee itself, however, made clear that it viewed Section 318 as a conflict-preemption provision (see FERC & SEC Br. 23-25), and both FERC and the SEC have adhered to that view since then. See *id.* at 14-19.

SEC/FERC regulation of a purchase and sale transaction is permissible because the SEC regulation of the purchase side of the transaction does not conflict with the FERC regulation of the sale side. If so, Ohio Power is relying on the "actual conflict" interpretation of Section 318 that we have proposed, and that we believe to be the only interpretation that supplies a workable standard for allocating jurisdiction between the two agencies.

Alternatively, Ohio Power could be arguing that the purchase and sale sides of the transaction are different "subject matters," and Section 318 thus has no application. Ohio Power, however, offers no justification for this conclusion. Indeed, with respect to each of these transactions, the purchase side can be characterized as a different "subject matter" from the sale side, or both purchase and sale can be seen as involving the same "subject matter"—the transfer of a utility asset. Similarly, as FERC itself contended, the regulation of rates can be seen as a different "subject matter" from the intra-corporate transfer price of coal, or both FERC and the SEC can be seen as regulating the same "subject matter"—the price of coal used by Ohio Power in generating electricity.

The above examples can be replicated with respect to many applications of Section 318. If the crucial determination under the statute is simply whether FERC and the SEC are regulating different "subject matters," the characterization of what "subject matter" is involved in a given regulatory action becomes all-important. Neither Ohio Power nor its amici offer any assistance in determining whether one or two subject matters are involved in the purchase and sale of a single utility asset—or in the setting of rates and the regulation of the intra-corporate transfer price of coal, or in any other possible area of contention under Section 318. In short, characterizing the "subject matter" involved in a given regulation is, in the absence of any suggestion as to the governing standards, a manipulable exercise.

If Ohio Power is right, the courts would have to devise a way to determine which subject matters were involved in a given case, with no guidance from the statute. A provision that read along these lines would be difficult to square with Congress's understanding that the SEC's expertise and regulatory objectives were centered in the area of finanical abuses and controls (see FERC & SEC Br. 28) while those of FERC centered on operational issues and ratemaking with respect to the interstate utility industry. See *id.* at 29. Such an amorphous approach would, moreover, be in tension with Congress's intent in PUHCA to preserve nonconflicting regulation by other federal and state agencies, see PUHCA §§ 20(b) and 21, 15 U.S.C. 79t(b), 79u, rather than to allocate all regulatory authority over utility holding companies and their subsidiaries to the SEC. See FERC & SEC Br. 22-23.

Section 318's bar, however, is not triggered simply by a determination of whether the same "subject matter" is involved in SEC and FERC regulation. Rather, it is triggered when "requirements" are imposed under both PUHCA and the FPA.[8] When a regulated entity is "required" by the SEC to undertake—or not to undertake—a particular action, any FERC regulation that imposes a different "requirement" with respect to that same subject matter is invalid. In other words, as the references to "conflict" in the heading of Section 318 and (repeatedly) in the legislative history (see FERC

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[8] Ohio Power mischaracterizes our position in asserting that we claim that it is "irrelevant" whether the subject matters of FERC and SEC regulation are the same. See Ohio Power Br. 19 n.12. The comment in our brief to which Ohio Power refers (Br. 35 n. 23) stated that the precise definition of "subject matter" will ordinarily be unnecessary, since the actual conflict analysis that we propose takes into account whether the same or different subject matters are involved; if there is an actual conflict of "requirements," the same subject matter is doubtless involved.

& SEC Br. 23-25) make clear, only when FPA-based regulation is in actual conflict with PUHCA-based regulation does Section 318's bar come into play. This standard provides a workable, pragmatic rule for allocating jurisdiction between the two agencies.

3. Ohio Power argues that the SEC has departed from an "actual conflict" understanding of Section 318, citing a statement that Chairman Shad presented to Congress in 1982, in which he advocated the repeal of PUHCA. See Ohio Power Br. 25. The statement notes that, in light of Section 318, "that portion of the industry represented by the registered holding company systems *is now subject to a different federal standard* for determining affiliate transaction prices than that applied to the rest of the industry." *Public Utility Holding Company Act: Hearings on H.R. 5220, H.R. 5465, and H.R. 6134 Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 582-583 (1982) (emphasis added).

Chairman Shad's statement, which mentioned this issue only in passing, does not support Ohio Power's position. Rather, the statement must be interpreted in light of the structure of holding company regulation. Utility subsidiaries of holding companies are subject to consistent, concurrent regulation under both PUHCA and the FPA. As a result of this dual regulation, they are necessarily subject to a *different* regulatory regime than are other firms in the utility industry; in the terms of this case, the Ohio Power-SOCCO transaction, unlike transactions among firms unrelated to holding companies, is subject *both* to regulations and orders under Section 13(b) of PUHCA *and* to non-conflicting regulations under the FPA. Because PUHCA-based regulation—not applicable at all to firms unaffiliated with holding companies—has primacy under Section 318 in cases of conflict, the regulations applied to holding company

affiliates may indeed be quite different from those applicable to firms that are not so affiliated.[9] As Chairman Shad recognized, if PUHCA were to be repealed, this difference would disappear.

In a similar vein, both Ohio Power (see Ohio Power Br. 34-35) and its amici (Amici Br. 19-20) attempt to explain the SEC's submission to this Court in *Northwestern Electric Co.* v. *FPC*, 321 U.S. 119 (1944), discussed in our opening brief (at 14-16). Neither Ohio Power nor its amici, however, can explain the SEC's repeated statements that "in case of *conflict* the requirements of [PUHCA] shall prevail," that "there can be no *conflict* of requirements and Sec. 318 does not apply" until the SEC or PUHCA has imposed regulation, and that regulation should not be thwarted by "conjuring up * * * imaginary *conflicts*."[10] Resp. Br. App. D, at 98-99, *Northwestern Electric Co.* v. *FPC*, *supra* (emphasis added). These statements make clear that the SEC, at least as early as 1944, believed that actual conflict between PUHCA-based and FPA-based requirements was necessary before Section 318 would act as a bar to FERC jurisdiction. It is this view that has guided both the SEC and FERC in pursuing their regulatory programs since that time, and it is this view that we urge should be adopted by the Court in this case.

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[9] Indeed, if Chairman Shad's statement were read the way Ohio Power suggests, it would have the incidental effect of rendering, *inter alia*, the SEC's own Rule 92 (see p. 11, *infra*), as well as the SEC's authority to grant exemptions under Section 13(b), a nullity.

[10] Nor do Ohio Power or its amici offer any explanation for the SEC's statements that, with respect to the issue in that case, "this exercise of accounting jurisdiction is not inconsistent with subsequent or concurrent accounting regulation of the same company by the F.P.C." and that "dual accounting regulation * * * has sound pragmatic justification, and is not inconsistent with the purpose of Sec. 318." Resp. Br. App. D, at 102. As we pointed out in our opening brief, this language plainly advances the view that concurrent, consistent—*i.e.*, non-conflicting—regulation by FERC and the SEC is permissible.

4. We continue to believe that a remand to the court of appeals is appropriate for a determination whether any requirement imposed by the four SEC orders in this case actually conflicts with FERC regulation. Section 13(b) of PUHCA, 15 U.S.C. 79m(b), renders certain transactions between associated companies unlawful:

> except in accordance with such terms and conditions and, subject to such limitations and prohibitions as the [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the [SEC] by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions * * * involve special or unusual circumstances or are not in the ordinary course of business.

This provision includes an authorization for the SEC to govern transactions between associated companies "by rules and regulations or order." In addition, it provides that SEC regulation is to be aimed at ensuring that such transactions be performed "economically and efficiently for the benefit of such associate companies at cost." Finally, Section 13(b) gives the SEC authority to exempt transactions, "by rules and regulations or order," under specified conditions.

Pursuant to the authority specifically granted in Section 13(b), the SEC issued a number of rules governing transactions between associated companies. Rule 90 prohibits such

transactions "at more than cost." 17 C.F.R. 250.90(a)(2).[11] Where a firm is selling goods it produced to an associated firm, the price is not "limited to cost." 17 C.F.R. 250.90(d). Instead, such goods must not be sold "at a price which exceeds the price at which the purchaser might reasonably be expected to obtain comparable goods elsewhere, or to furnish them itself, giving due regard to quality, quantity, regularity of supply, and other factors entering into the calculation of a fair price." 17 C.F.R. 250.92. In the absence of orders directed toward a specific transaction, these rules generally govern the price term of inter-associate contracts.

With respect to the particular relationship between Ohio Power and SOCCO, the SEC issued four orders. J.A. 76, 79, 85, 93. The first order provided that "[t]he charges for coal * * * will be based on an amount equal to the actual cost." J.A. 77. The three other orders stated that the price would "not exceed" cost. J.A. 82, 89, 94. The meaning of these orders is disputed. Compare Ohio Power Br. 27 n.21 with Pet. Br. 42, 44 n.29 and Pet. App. 21a-23a (Mikva, J., concurring in the judgment) and Pet. App. 35a-37a (FERC opinion).

Given its erroneous understanding of Section 318, the court of appeals had no occasion to construe the four SEC orders and the application, if any, of SEC Rules 90 and 92.[12]

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[11] Rule 90(a)(2), 17 C.F.R. 250.90(a)(2), specifies that cost is "determined pursuant to [Rule 91, 17 C.F.R.] 250.91 or any other applicable rule, regulation, or order of the Commission, or in the absence thereof, in accordance with sound methods of determining cost."

[12] Ohio Power is mistaken in claiming that the court of appeals found that the SEC orders had the effect of applying Rules 90 and 91 – mandating a cost-based price term for inter-affiliate contracts – to the transactions in question, rather than Rule 92, which provides for a market-based price. Br. 18 n.11. In fact, the court of appeals based its decision solely on "the threshold matter of the language of the

If the orders impose a strict at-cost requirement on Ohio Power's purchases of coal from SOCCO, they are in conflict with the FERC order in this case and Section 318 bars FERC jurisdiction. If, on the other hand, they impose only a cost-based ceiling on the price of coal or otherwise do not impose a requirement, the FERC order in this case may be in whole or part consistent with the SEC orders and regulations, and hence permissible under Section 318. The case should be remanded to the court of appeals for application of the actual conflict standard to the four SEC orders at issue in this case.[13]

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statute." Pet. App. 15a. The court referred to Rules 90 and 91 to make the point that the language concerning cost in the SEC orders may have been no more than "references in passing" to Ohio Power's "election of, and unexamined representations of conformity with, the Rule 91 at-cost method." Pet. App. 15a. Nothing in Rules 90, 91, or 92 suggests that a regulated entity may make an "election" as to which of the rules it chooses to comply with.

[13] Although the concurring member of the panel below (Pet. App. 23a-28a) found that FERC's order was invalid because it contravened one of FERC's own regulations, 18 C.F.R. 35.14(a)(7), the issue was not reached by the majority. Ohio Power has not argued in its opposition to the petition for certiorari or in its brief on the merits in this case that this Court should affirm the court of appeals' result on this ground. See Ohio Power Br. 44-45. As FERC has argued, its order in this case does not contravene 18 C.F.R. 35.14(a)(7). See FERC C.A. Pet. for Reh'g 12-14; FERC C.A. Br. 30-32; Pet. App. 40a-41a; J.A. 20-24.

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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*Acting Solicitor General**

JULY 1990

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* The Solicitor General is disqualified in this case.

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